No. 16448 ✓ Vol 3111

United States
Court of Appeals
for the Ninth Circuit

GREGORIO ARCIAGA MESINA,

Appellant,

vs.

RICHARD C. HOY, District Director of Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

FILED
JUL 30 1959
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—7-24-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

NORMAN STILLER,
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For Appellee:

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RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

ARLINE MARTIN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern District of California, Central Division

No. 998-58-PH

GREGORIO ARCIAGA MESINA,

Plaintiff,

vs.

RICHARD C. HOY, District Director of Immigration and Naturalization Service, Department of Justice,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Plaintiff Respectfully Shows to This Court and Alleges:

I.

That this action arises out of, and is based on the Declaratory Judgment Act (28 U.S.C.A., 2201) and Section 10 of the Administrative Procedure Act (5 U.S.C.A., 1009).

II.

That the plaintiff is a resident of the County of Los Angeles, State of California.

III.

That the defendant is the District Director of the Immigration and Naturalization Service, Department of Justice, at Los Angeles, California.

IV.

That the plaintiff was born in the Philippine Islands in 1903 and at birth was a national of the United States. He entered the continental United States in 1924, obtained a declaration of intention, No. 13624, at New Orleans, Louisiana, on May 1, 1929, and was a lawful permanent resident of the United States at the time his deportation was effectuated in 1936.

V.

That the plaintiff was the subject of deportation proceedings before the Immigration and Naturalization Service in Puerto Rico in 1935, which were based on a warrant charging that plaintiff violated the Act of 1917 in that he had been found managing a house of prostitution, and that he had been found to have received, shared in, or derived benefits from the earnings of a prostitute. That these deportation proceedings resulted in plaintiff being deported to the Philippine Islands on April 18, 1936.

VI.

That the plaintiff was employed by the United States War Department on April 10, 1946, in Manila, Philippine Islands, in the capacity of an able seaman in the Army Service Forces, Transportation Corps, Pacific Theater, with permanent duty station being San Francisco Port of Embarkation, Fort Mason, California. That such employment was continuous until December 4, 1954. That during such employment he received a letter of

commendation from his commanding officer praising his unfailing loyalty to the United States during the Korean conflict.

VII.

That while in the service as a merchant seaman, having sufficient service to be eligible for naturalization, plaintiff sent a completed application for citizenship (Form N-400) to the Immigration and Naturalization Service at San Francisco, California, and the application was not received until February 4, 1954, and the applicable provision of law under which plaintiff could have filed having expired on December 24, 1953, while plaintiff was at sea and unable to reach the continental United States, he was not eligible to file a petition for naturalization.

VIII.

That on December 31, 1956, plaintiff entered the United States at Baltimore, Maryland, as a crewman and was "authorized" to remain in the United States until February 27, 1957; that such entry could only have been authorized if plaintiff had applied to the Attorney General of the United States for admission under Section 212(a)(17), (8 U.S.C., 1182(a)(17)), and plaintiff had not done so; that plaintiff should not have been and could not have been legally authorized to enter the country under Section 101(a)(15), (8 U.S.C., 1101(a)(15)), as a nonimmigrant or otherwise because of the prior deportation.

IX.

That on June 11, 1957, the plaintiff was served with an Order to Show Cause by the Immigration and Naturalization Service, ordering plaintiff to show cause why he should not be deported from the United States on the charge that as a nonimmigrant he had remained in the United States longer than permitted (Section 241(a)(2) of the Act of 1952), (8 U.S.C., 1251(a)(2)).

X.

That on June 28, 1957, after a hearing, a Special Inquiry Officer of the Immigration and Naturalization Service ordered that plaintiff be deported from the United States on the charge contained in the Order to Show Cause; that the findings of said officer show that this plaintiff is the same person against whom a previous order of deportation was issued, that he had been previously deported as a member of the classes enumerated in Section 242(e) of the Act (8 U.S.C., 1252(e), and that plaintiff had re-entered without applying for permission to re-apply for admission to the United States after arrest and deportation, nor did plaintiff at any time apply for or receive an immigrant visa; that the findings of the Special Inquiry Officer bring the plaintiff within the purview of Section 242(f) of the Act (8 U.S.C., 1252(f)), and consequently the Order to Show Cause should charge him with deportability only under Section 242(f) of the Act (8 C.F.R., 242.6).

XI.

That on December 12, 1957, the Board of Immigration Appeals, United States Department of Justice, ordered the outstanding order of deportation withdrawn and that proceedings be reopened to examine whether plaintiff's deportation in 1936 was pursuant to law and to determine whether plaintiff had been accorded due process.

XII.

That on January 9, 1958, at a reopened hearing, the Examining Officer, John J. Kelleher, of the Immigration and Naturalization Service, refused to charge plaintiff under Section 242(f) of the Act (8 U.S.C., 1252(f)) as requested by counsel; that the requirements of the statute (Section 242(f)) and of the regulations (8 C.F.R., 242.6) are mandatory; that the regulations specify that if deportability as charged pursuant to 8 C.F.R., 242.6 is established, the Special Inquiry Officer shall order that the previous order of deportation be reinstated and that the plaintiff be deported under said reinstated order of deportation in accordance with Section 242(f) of the Act (8 C.F.R., 242.22); that the Immigration and Naturalization Service has applied this section in the past in similar proceedings; that the refusal by the Examining Officer to lodge such a charge when requested by plaintiff's counsel was an arbitrary and capricious violation of the regulations of the Immigration and Naturalization Service.

That if the deportation order of 1936 were reinstated it could be shown that it was the result of a serious deprivation of due process in that:

1. Plaintiff being born in the Philippine Islands in 1903 was a national of the United States and not an alien when deported in 1936; and as a national of the United States he could not be deportable for acts which furnished the basis for his deportation in 1936;

2. The warrant of arrest was unlawfully issued in that there was no substantial supporting evidence on which it could be based;

3. The conduct of the hearing officer as detective, policeman, prosecutor, note-taker, interpreter, and judge resulted in a hearing inconsistent with fairness and impartiality required by the concept of due process of law;

4. Plaintiff was not allowed to cross-examine the declarants of unsigned ex parte statements introduced by the hearing officer as exhibits;

5. Months after the hearing the said hearing officer made secret representations to the Board of Review unknown to the plaintiff or to his attorney;

6. Such conduct by the hearing officer and the Board of Review in accepting the hearsay statements of the hearing officer was grossly unfair and unjust; that an indispensable condition of a fair hearing of a litigated issue was and is that the decision be governed by and be based upon the evi-

dence at the hearing, that any ex parte consideration of vital evidence without allowing plaintiff a chance to rebut them did constitute and does constitute a denial of due process of law.

That as a result of aforesaid reopened hearing of January 9, 1958, in a decision dated February 17, 1958, the Special Inquiry Officer found the plaintiff to be deportable in accordance with the deportation charge contained in the Order to Show Cause.

XIII.

That on August 7, 1958, the Board of Immigration Appeals, United States Department of Justice, affirmed the decision of the Special Inquiry Officer and dismissed the appeal of the plaintiff and concurred in the recommendations of the said officer that the plaintiff be granted voluntary departure.

XIV.

That on or about the 13th day of October, 1958, the defendant granted plaintiff nine (9) days to effect his departure from the United States at his own expense and informed plaintiff that failure to depart on or before October 22, 1958, may result in withdrawal of the privilege of voluntary departure and steps taken to effectuate deportation.

Plaintiff has reason to believe that because of his failure to depart from the United States an order of deportation will be issued.

XV.

Official records of the deportation proceedings

herein are in the custody of the defendant, Richard C. Hoy, and your petitioner prays that said records be produced and considered an exhibit herein.

XVI.

That all administrative remedies available to this plaintiff in this mattter have been exhausted.

Wherefore, Plaintiff prays for the following relief together with such other and further relief which this Court may deem just and proper:

1) Plaintiff prays that a declaratory judgment be made herein vacating and declaring null and void the prior deportation order executed in April of 1936 by the Immigration and Naturalization Service and further declaring that plaintiff is a permanent resident of the United States.

2) Plaintiff prays that a permanent injunction be granted restraining and enjoining defendant from taking any steps to deport plaintiff based upon the charge under Section 241(a)(2) of the Immigration and Naturalization Act (8 U.S.C., 1251(a))—Nonimmigrant, remained longer.

/s/ GREGORIO ARCIAGA MESINA.

/s/ NORMAN STILLER,
Attorney for Plaintiff.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Norman Stiller, plaintiff's attorney, whose address is 995 Market Street, Room 918, San Francisco 3, California, an answer to the complaint which is herewith served upon you, within Sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 16, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk of Court.

/s/ MURRELL E. THOMPSON,
Deputy Clerk.

[Endorsed]: Filed October 23, 1958.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Richard C. Hoy, District Director of the Immigration and Naturalization Service at Los Angeles, California, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Defendant neither admits nor denies the allegations contained in Paragraph I of plaintiff's complaint, the same being conclusions of law.

II.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph II and on that ground denies said allegation.

III.

Referring to the allegations contained in Paragraphs III, IX, XI, XIII, XIV, XV andXVI, of plaintiff's complaint, admits said allegations.

IV.

Referring to the allegations contained in Paragraph IV of plaintiff's complaint, admits that plaintiff was born in the Philippine Islands on or about 1903 and at birth was a national of the United States, and that he entered the continental United States in 1924. Defendant has no information or knowledge sufficient to form a belief as to the truth of the remainder of the allegations in said Paragraph IV and on that ground denies said allegations.

V.

Referring to the allegations contained in Paragraph V, admits said allegations, but alleges that the warrant of arrest which instituted such proceedings, issued June 25, 1935, charged that plaintiff had been found managing a house of prostitution, or

music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

VI.

Referring to the allegations contained in Paragraph VI, denies said allegations, and alleges that plaintiff's employment in the Department of the Navy was as follows:

Position	Vessel	From	To	Type of Service
Able Seaman	USAT LST-914	17 Jun 1946	18 Jul 1947	Foreign
Able Seaman	USAT Lock Knot	7 Aug 1947	20 Feb 1949	Foreign
Able Seaman	USAT Sgt J E Muller	21 Feb 1949	30 Jun 1950	Foreign
Able Seaman	USNS Sgt J E Muller	1 Jul 1950	12 Jun 1951	Foreign
Able Seaman	USNS Sgt J E Muller	14 Sep 1951	18 Sep 1951	Foreign
Able Seaman	USNS Sgt J E Muller	27 Nov 1951	10 Jul 1952	Foreign
Able Seaman	USNS Sgt J E Muller	15 Sep 1952	31 Mar 1953	Foreign
Able Seaman (Maint)	USNS Sgt J E Muller	1 Apr 1953	3 Jun 1953	Foreign
Carpenter	USNS Sgt J E Muller	4 Jun 1953	12 Aug 1953	Foreign
Able Seaman (Maint)	USNS Sgt J E Muller	21 Oct 1953	4 Dec 1954	Foreign

VII.

Referring to the allegations contained in Paragraphs VII, VIII and XII, denies said allegations.

VIII.

Referring to the allegations contained in Paragraph X, admits that on June 28, 1957, after a hearing, a Special Inquiry Officer of the Immigration and Naturalization Service ordered that plain-

tiff be deported from the United States on the charge contained in the Order to Show Cause; denies each and every other allegation contained in said paragraph.

IX.

Admits, as alleged in Paragraph XII, that as a result of a reopened hearing of January 9, 1958, in a decision dated February 17, 1958, the Special Inquiry Officer found the plaintiff to be deportable in accordance with the deportation charge contained in the Order to Show Cause, but denies each and every other allegation contained in said Paragraph XII.

Wherefore, defendant prays that this Court determine that the deportation order is valid and that plaintiff is deportable, and for such other and further relief as to the Court seems appropriate.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

ARLINE MARTIN,
Assistant U. S. Attorney;

/s/ ARLINE MARTIN,
Attorneys for Defendant.

Affidavits of Service by Mail attached.

[Endorsed]: Filed November 18, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM

Statement of Facts

Plaintiff is a native and citizen of the Philippines, 55 years of age, who last entered the United States in 1956, as a seaman. The charge in the order to show cause is that, after entry as a non-immigrant, he remained longer and is deportable under Sec. 241(a)(2) of the 1952 Act.

The facts now of record—recorded on reopening by direction of the Board of Immigration Appeals—establish that plaintiff is identical with the Gregorio Mesina who (a) had lawfully entered the United States for permanent residence in 1931; (b) was deported to the Philippines in 1936; (c) was deported as a member of one of the classes enumerated in Sec. 242(e) of the 1952 Act; and (d) re-entered in 1956 without having been granted permission to reapply. In accordance with the Board of Immigration Appeals' order of December 12, 1957, the complete record of the prior deportation of plaintiff was admitted in evidence as Exhibit 5 (R. 10).

Following the introduction of this evidence, counsel moved for reinstatement of the previous order of deportation in accordance with Sec. 242(f) of the 1952 Act, which was denied. Thereafter, the Special Inquiry Officer concluded that plaintiff had been previously deported in pursuance of law (that is, that plaintiff had been afforded due process of

law in that proceeding), and was deportable on the charge contained in the order to show cause (although voluntary departure was granted). The Board of Immigration Appeals' prior order directed that the case be certified back to the Board of Immigration Appeals, and the order was affirmed.

Argument

Plaintiff wishes to call the Court's attention to lines 29 to 31 on page two (2) of defendant's memorandum. In examining the exhibits offered by the Government and also the transcript of hearings held on June 19, 1957, and on January 9, 1958, we are unable to find any mention or reference to a failure on plaintiff's part to disclose that he had previously been deported. Consequently, lines 29 to 31, page two (2) should be ordered stricken from defendant's memorandum and the Court should disregard said lines and allegations contained therein.

The charge of the order to show cause shows that plaintiff entered the country lawfully and remained longer than authorized. That this charge is unsupportable on this record is manifest—plaintiff was previously deported and could only seek admission if he had applied to the Attorney General under Section 212(a)(17). Plaintiff had not applied under Section 212(a)(17) and should not have been and could not have been legally authorized to enter the country under Section 101(a)(15) as a non-immigrant or otherwise because of the prior deportation.

Hence the plaintiff cannot lawfully be deported on the sole charge made on the order to show cause.

On the present record, the only appropriate charge is under Sec. 242(f) of the 1952 Act: The decision of the Board of Immigration Appeals dated December 12, 1957, was rendered on a deficient record, in that the official record of deportation of plaintiff in 1936 was not in evidence; the Board of Immigration Appeals ordered reopening of the case for a determination as to whether plaintiff was deported in 1936 pursuant to law, and for recordation of all available official information respecting such deportation. On the present record, and on the authority of the law, the regulations and U. S. ex rel. Blankenstein vs. Shaughnessy, 112 F. Supp. 607, it is sumitted that on this record the charge must be laid under Sec. 242(f). The Board apparently relied upon Blankenstein, supra, for the proposition that "there is no automatic reinstatement of the previous order of deportation," for as the Court said (at 610):

> "Section 242(f) specifically provides: 'Should the Atty. General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation * * * the previous order of deportation shall be deemed to be reinstated from its original date * * *' Thus, the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom

> the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in Sec. 242(e) of the Act; and (3) that he had unlawfully re-entered. 8 CFR Sec. 242.75. Then, and only then, is the previous order of deportation reinstated."

The regulations as revised January 1, 1958, provide:

> "Sec. 242.6 Aliens deportable under Section 242(f) of the act. In the case of an alien within the purview of Section 242(f) of the act, the order to show cause shall charge him with deportability only under Section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section."

The record as now constituted establishes all of the prerequisites of the statute, the regulations and interpretation thereof. The requirement of the statute and of the regulations is mandatory. Hence, no other charge can be made or, if made, can not lawfully be sustained.

If the 1936 deportation is re-examined many aspects of its record will show that plaintiff was deprived of due process of law.

(1) Plaintiff was not an alien in 1936: This proposition is established by the decision of the Supreme Court in Rabang vs. Boyd, 353 U. S. 427, holding that persons born in the Philippine Islands

and permanently resident in the United States "became aliens on July 4, 1946." Irrespective of any technical rules, it is submitted that where a finding of alienage was made, or was assumed (as in the original warrant of arrest), contrary to law, that basic error of law robs the prior deportation of any validity.

No interpretation of the law could have held plaintiff to be an alien until the Philippine Independence Act became effective; the Act was passed by Congress in March, 1934, but was by its terms not to be effective until the Philippine people accepted it. "Formal acceptance became effective May 14, 1935." Del Guercio vs. Gabot, 161 F. 2d 559. Had plaintiff been considered to be an alien as of May 14, 1935, any conduct alleged to subject him to deportation would have had to occur subsequent to May 14, 1935. Note that in the case cited by the Special Inquiry Officer—Matter of O, III I&N Dec. 155, at page 158 the Board refers to the alien's misconduct as having occurred "after the effective date of the Independence Act." There is really no evidence in the 1935 record which would even allege, much less prove, such misconduct after May 14, 1935—note, again, that the telegraphic warrant of arrest and application therefore were dated June 25, 1935, and as we shall later see, there was no evidence whatever of record at that time.

This argument was presented to the Board of Immigration Appeals but said Board made no answer to this charge or any other referring to the fact

that Plaintiff was not an alien but a national at the time the alleged acts were said to be performed.

(2) The warrant of arrest was unlawfully issued: The opinion of the Board of Immigration Appeals is erroneous in that it asserts that the warrant of arrest was based on the sworn statements of five persons—the request for the warrant came approximately six weeks before any such sworn statements.

Rule 19, Subd. B of the regulations in force in 1935 required that the warrant of arrest application

> "must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry * * * and should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government * * * the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an Inspector. * * * Telegraphic application may be resorted to only in case of necessity, or when some substantial interest of the Government would be observed thereby, and must state * * * the substance of the facts and proof contained in such application."

These requirements were further provided for by informal instructions disseminated by the Service in Lecture No. 22, November 12, 1934, "Warrant and Deportation Procedure," whose author, W. W. Brown, was then head of the Warrant Division of the Department; the gist of the regulation is repeated, and the purpose of the foregoing requirements is indicated by the statement in his lecture that

> "The applications, together with supporting evidence, are reviewed at the Central Office by officers especially qualified for that purpose and if a prima facie case is established, a warrant of arrest signed by the Secretary or one of the assistants is issued."

The telegraphic warrant of arrest was applied for in this case, without compliance with the lesser requirements regarding necessity or substantial interest of the Government, and without compliance with the basic requirements as to "substantial supporting evidence." In fact, the telegraphic application did not state the substance of the facts and proof which were supposed to support the regular application, evidently because the regular application was not so supported; the sole alleged basis for the application was a memorandum of Robert J. Leith, Immigrant Inspector, to the District Director, which stated:

> "In re: George Messina.
>
> "It has been reported to this office from sources considered to be reliable that a Filipino

known as George Messina is the proprietor of a house of prostitution. It is further stated in the report that Messina has four or five Porto Rican girls living in his house, where they are practicing prostitution.

"It is, therefore, respectfully suggested that a cablegraphic warrant of arrest be applied for in this case."

The formal application for the warrant of arrest, not received by the Central Office until July 2, 1935, was as much in violation of the regulations as the telegraphic application, since neither was accompanied by substantial supporting evidence, or in fact by any evidence at all. The hearsay statement of Inspector Leith was in direct conflict with the regulation and consistent instructions—he made no effort even to take a statement from the "sources" of which he spoke, much less an affidavit or transcript of a sworn statement—it was simply rumor. It is deemed fair comment to say that, the lack of basis for the application for the warrant may have even dictated the use of cable or telegraph—to avoid the specific requirements of the regulation.

The importance of obeying the regulations with regard to the application for, and issuance of, warrants of arrest may perhaps be noted by reference to the leading case of Whitfield vs. Hanges, 222 Fed. 745 at page 749. Failure to adhere to the rule that the application for the warrant must be supported by substantial evidence, and an accompanying failure to show or read to the alien the

evidence upon which the warrant had been issued rendered the proceeding unfair from its inception—and rendered the hearing unfair; Sibray vs. U. S., 282 Fed. 795, 796; Ex parte Radivoeff, 278 Fed. 227; and Whitfield v. Hanges, supra. Manifestly plaintiff could not have had notice of any evidence which was supposed to support the warrant of arrest, and concomitant opportunity to refute that evidence, because there was no scintilla of evidence to support the application and no such notice and opportunity could have been afforded. The allegation of Inspector Leith (1935 R. 3) that the ex parte statements Exs. A, B, C, D and E were "evidence on which the warrant of arrest is based" could not be true, since the earliest date on any such reported statement is August 6, 1935, (Ex. B), and the others are all dated later, whereas the warrant application and warrant are dated June 25, 1935.

(3) The 1935 hearing officer intermingled the functions of detective, policeman, prosecutor, note-taker, interpreter and judge:

As indicative of what were approved practices in deportation hearings in 1935, we note that in Lecture No. 1, February 12, 1934, then Commissioner D. W. MacCormack, initiating the series of lectures intended to guide the future conduct of Service personnel, stated (inter alia) that some of the worst criticisms of the Service had been the "failure to realize that its function is primarily judicial in nature," "third-degree methods," and "the practice of having the same inspector as investigator, arrest-

ing officer and trial officer." In Lecture No. 22, November 12, 1934, W. W. Brown stated (p. 5):

> "in the past, formal hearings have frequently been conducted by the same officer who conducted the preliminary hearing and investigation. At the present time, however, and wherever possible the hearing is given by some officer other than the investigating officer. When it is found that the alien is unfamiliar with the English language to the extent he is unable to comprehend the proceedings, a competent interpreter is employed at Government expense."

In this case, Inspector Leith carried on all functions from beginning to end, with nothing of record to indicate why he was chosen to perform all of the varying and inconsistent duties. Perhaps the most damaging ex parte statement alleged to have been taken by Inspector Leith is the reported statement of one Marta R. Caraballo, which was introduced in evidence over objection (1935, R. 3). In the purported taking of this statement, Inspector Leith played the whole role alone—he was investigator, interpreter and (apparently) note-taker. The purported statement of Perez was not even signed—it could not have been, because as shown by the notes of stenographer-interpreter Ramirez, the alleged transcript was merely a transcript of "my shorthand notes regarding this sworn statement, as dictated to me by Inspector Robert J. Leith." How it was possible for Inspector Leith to have remembered what to dictate, and whether he had the capacity of trans-

lating or interpreting from the Spanish language (used by Perez) and the English language (which he dictated to Ramirez), are but two unexplained mysteries in the picture of gross unfairness.

These facts exemplify and document how Inspector Leith initiated the charges on stated hearsay from undisclosed sources, without supporting evidence of any kind, and then endeavored to carry his charges through to the conclusion of plaintiff's deportation—sometimes the Inspector being the only person present when a witness was alleged to have made a sworn statement to him in a foreign language. Standing alone, the failure to establish of record that a "competent interpreter" was used in the proceedings constitutes the denial of a constitutional right and renders the hearing unfair; Gonzales vs. Zurbrick, 45 F. 2d 934 (CAA 5, 1930). Moreover, there is nothing of record to indicate why Inspector Leith was permitted to discharge his many immiscible functions to this amazing point:

During the very course of the "hearing," with the Inspector sitting as prosecutor and judge (on the morning of the last day of the hearing, September 17, 1935), the testimony of witness Burgos, called as a witness by Inspector Leith (135, R. 27) shows: That the inspector, accompanied by the person who was interpreter at the hearing, entered the house of Burgos without permission; Burgos, as the Inspector's witness, testified (R. 30) that "they lost their temper," "he (Leith) went up in the air," "he

lost his temper and threatened me if I would not come to testify" (against the plaintiff); that Inspector Leith was in full uniform and "had a pistol on his hip." The questioning of Burgos by the Inspector is replete with questions regarding "the Filipino," without any identification as to the person to whom the Inspector was referring. Witness Burgos finally asked this question of Inspector Leith:

> "A. No, sir, I don't know the Filipino. I don't know anything about him. Who is the Filipino?"

Instead of answering this question, Inspector Leith did this:

> "Examining Officer: No further questions."

When the case was reviewed by an examiner for the Board of Review (1935 recommendation, p. 7) the examiner completely garbled these facts:

> "Burgos further testified when asked whether he said the Filipino's house was a house of prostitution, 'No, I don't know the Filipino, I don't know anything about him. Who is the Filipino?' At this point the attorney refused to continue with the case and advised his client to answer no more questions."

The egregious error of this finding is that it was Inspector Leith who closed the examination of his own witness, after having failed or refused to identify to the witness the "Filipino" about whom he had been asking questions, and it was after an

exchange of Stenographer-interpreters (caused by the fact that the Inspector had had the stenographer testify to try to impeach his own witness) that the attorney stated that he declined to permit plaintiff to be again cross-examined, since he had already been cross-examined, previously. And the attorney did not refuse to continue with the case, since he stated (R.31):

> "* * * I have no more witnesses except to cross-examine a girl confined in the Insular Sanatorium."

Inspector Leith did not even deign to acknowledge this further demand for cross-examination of the girl whose statement he had purported to take in the Sanatorium, and closed the case with the addition of the charge "Receiptor" over the objection of counsel, without giving either plaintiff or his counsel any opportunity whatever to answer or produce evidence on that charge. As stated in U. S. v. Van de Mark, 3 F. Supp. 101, when one man acts as "inquisitor, interpreter, prosecutor and judge"

> "The trial moves rapidly on when the judge has determined the sentence beforehand."

(4) The right of cross-examination of witnesses was refused: As pointed out above, Exhibit A in the 1935 hearing, the alleged sworn statement of one Marta Rodriguez Carabello, purporting to have been taken from her in a sanitarium, but actually dictated by Inspector Leith to a stenographer at some other time and place, and unsigned by her,

was introduced in evidence over the objections of counsel; over and over again, counsel specifically requested the right of cross-examination of all of the persons from whom the inspector took statements. Even though this woman is reported to have stated that she would be willing to appear as a witness, up to the very last few minutes of the hearing, counsel's repeated demands were ignored. Notwithstanding, the Board of Review recommendation relied upon this woman's statement, Ex. A, and the other four purported statements, as "the principal evidence in support of the charges against the alien." The Board examiner merely noted the objections of counsel as to Carabello and stated: "It appears probable that her testimony might have been taken by going to the institution for the purpose, but this was not done."

As to Josefina Ruiz (Ex. D, 1935) the refusal of the inspector to call her for cross-examination was excused by the Board examiner on the statement that "possibly because her statements were not as clear and definite in support of the warrant charges as those of the other witnesses." In other words, because the ex parte witness Ruiz had given a statement quite favorable to the plaintiff, and which did not "support the warrant charges," the inspector refused to call her as a witness at the hearing and contented himself with introducing her ex parte statement, and denying any examination of her by counsel.

The serious consideration given to at least two

ex parte statements as part of the "principal evidence" to sustain the warrant charges, against the respondent, where the makers of the statements could have been produced at the hearing, renders the hearing and decision unfair; Ungar v. Seaman, 4 F. 2d 80 (CCA 8, 1924); Whitfield v. Hanges, supra; Schenck v. Ward, 6 F. Supp. 739; Ex parte McMahon, 1 F. 2d 456; Ex parte Chin Loy Yow, 223 Fed. 833; Gonzales v. Zurbrick, supra; Svarney v. U. S., 7 F. 2d 515; and Maltez v. Nagle, 27 F. 2d 835. It seems more than significant that the cases wherein such practices of the Service have been most severely criticized are those involving charges that the respective respondents were engaged in the managing of houses of prostitution, and the "evidence" relied upon consisted of statements of members of that oldest profession in the world—as in Whitfield and Svarney, supra.

(5) The inspector made secret representations which influenced the Board of Review: Months after the hearing was completed, the record was forwarded by the District Director at San Juan to the Commissioner (January 2, 1936). Contrary to the practice prescribed in Lecture 22, the District Director himself made no recommendation to the Commissioner; this was error, of course. The only recommendation was made by Inspector Leith, who recommended plaintiff's deportation. To this, the Inspector appended a pageful of statements headed up

"Comments by Inspector Leith"

These comments consisted in attacks upon the testimony of eight witnesses, whose testimony in open hearing was favorable to the plaintiff. As an example, the Inspector attacked the testimony of witness Jenaro de Jesus by stating that this witness had not reported to the authorities an alleged house of prostitution next door to Mesina's house.

The record shows that witness de Jesus was not asked if he knew that there was a house of prostitution further down the street or in the vicinity and he was not asked as to whether, if he knew of the existence of such a place, he had or had not reported it to the authorities. Additionally, there is no evidence of record that he had not made such a report. The inspector went on to suggest and request that the testimony of each and every witness favorable to plaintiff "be not considered" in his (plaintiff's) behalf and favor.

The allegations of Inspector Leith in his "comments" were not known to plaintiff or his counsel, who had no notice of them and no opportunity to rebut them. Notwithstanding, turning to page 4 of the Board of Review recommendation, we find that the Board examiner adopting in toto the unfounded and unsupported statement regarding witness de Jesus, and, in fact, adopting virtually completely all of the "comments" of Inspector Leith.

The case of Ungar v. Seaman, supra, is relied upon by the Special Inquiry Officer in this case

as the leading case on matters related to fairness of hearing; in that case the Circuit Court of Appeals (4 F. 2d at pages 84 and 85) said:

> "The introduction and receipt by the assistant Secretary of Labor, after the hearing was closed, without notice to or knowledge of the accused, of the hearsay statements of the immigration inspector * * * was grossly unfair and unjust. * * * Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi-judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it."

Conclusion

In view of the foregoing, it is respectfully requested that the Court make a declaratory judgment vacating and declaring null and void the prior deportation order executed in April of 1936 by the Immigration and Naturalization Service and further declaring that plaintiff is a permanent resident of the United States; and, further that the Court grant a permanent injunction restraining and enjoining defendant from taking any steps to deport plaintiff based upon the charge under Section 241 (a)(2) of the Immigration and Naturalization Act

(8 U.S.C., 1251(a))—Nonimmigrant, remainded longer.

/s/ NORMAN STILLER,
Attorney for Plaintiff.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is a proceeding for declaratory relief and injunction by the plaintiff under 28 U.S.C.A., 2201 and 5 U.S.C.A., 1009.

The case was set for trial and was tried on January 6th, 1959.

Plaintiff was born in the Philippine Islands in 1903; he first entered the United States in 1924; he was ordered deported, and was deported in April, 1936, on the ground that he had been managing a house of prostitution, and had been found to have received and derived benefits from the earnings of a prostitute.

On December 31, 1956, plaintiff entered the United States as a crewman, receiving a Crewman's Landing Permit (State Dept. Symbol D-2), and was required to depart from the United States before the expiration of twenty-nine (29) days. [8 U.S.C.A., 1282(a) (2)]. At that time he was a non-immigrant alien under 8 U.S.C.A., 1101(a) (15)

(D). This permit appears to have been extended to February 27, 1957.

Plaintiff did not depart, and proceedings were commenced against him in the Immigration & Naturalization Department, which finally resulted in an Order as follows:

"Order

"It is ordered that the respondent be granted voluntary departure at his own expense in lieu of deportation within such period of time and under such conditions as the District Director shall direct.

"It Is Further Ordered that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause."

An appeal was taken and the Order was affirmed by the Board of Immigration Appeals on August 7, 1958. This suit followed.

Plaintiff's principal contention is that the proceedings were had under Section 241(a)(2) of the Immigration & Naturalization Act of 1952—8 U.S.C.A., 1251(a)(2)—rather than Section 242(f) of the Immigration & Naturalization Act of 1952—

8 U.S.C.A., 1252(f)—which latter section permits the Attorney General to reinstate a previous order of deportation.

Plaintiff contends that it is mandatory that the proceedings be commenced under 8 U.S.C.A., 1252 (f), and that being so, the original proceedings of deportation may be attacked on the various grounds of illegality set forth in the Petition, which are not necessary to note at this point.

There is nothing to plaintiff's point that the proceedings for his deportation must be had under 8 U.S.C.A., 1252(f). Blankenstein v. Shaughnessy, (D.C., S.D., N.Y., 1953) 112 F. Supp. 607. And see Souza v. Barber, No. 15913, United States Court of Appeals, Ninth Circuit, January 30, 1959, as yet unreported, which holds that 8 U.S.C.A., 1252 (f) is a procedural section only.

Plaintiff was a non-immigrant alien under the terms of 8 U.S.C.A., 1101(a)(15)(D). He was admitted under 8 U.S.C.A., 1282(a)(2), and was properly deportable by the Attorney General by proceedings under either 8 U.S.C.A., 1251(a)(2) or 8 U.S.C.A., 1252(f), as the Attorney General in the exercise of his discretion may choose.

Petitioner cannot compel the Attorney General to exercise his discretion at the choice of the petitioner.

Counsel will prepare Findings of Fact and Conclusions of Law in accordance with this Memorandum.

Dated: Los Angeles, California, this 19th day of February, 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed February 19, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JAN. 6, 1959

Present: Hon. Peirson M. Hall, District Judge.

Proceedings: For trial. Court orders trial proceed.

Plaintiff's Exhibit 1 is marked for identification and admitted in evidence.

Plaintiff rests.

Plaintiff's Exhibits A-1 and A-2 are marked for identification. Plaintiff objects. Counsel argue. Court orders Exhibit A-1 admitted in evidence, but denies permission to enter Ex. A-2 in evidence.

Government rests.

Court hears argument of counsel and orders cause submitted for final determination.

JOHN A. CHILDRESS,
Clerk;

By /s/ S. W. STACEY,
Deputy Clerk.

United States District Court, Southern District of California, Office of the Clerk

Entry of Judgment

Norman Stiller, Esq.,
995 Market St.,
San Francisco 3, Calif.

Laughlin E. Waters, Esq.,
600 Federal Bldg.,
Los Angeles 12, Calif.

Re: Mesina vs. Hoy, etc., No. 998-58-PH.

You are hereby notified that judgment in the above-entitled case was entered this day March 4, 1959, in the docket.

I hereby certify that this notice was mailed on March 4, 1959.

CLERK, U. S. DISTRICT COURT,

By /s/ C. A. SIMMONS,
Deputy Clerk.

United States District Court for the Southern District of California, Central Division

Civil No. 998-58-PH

GREGORIO ARCIAGA MESINA,

Plaintiff,

vs.

RICHARD C. HOY, District Director of Immigration and Naturalization Service, Department of Justice,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above matter having come on for trial on January 6, 1959, before the Honorable Peirson M. Hall, plaintiff appearing by Norman Stiller, and defendant being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Arline Martin, Assistants United States Attorney, and the certified copy of the Immigration and Naturalization hearing having been introduced in evidence as Defendant's Exhibit 1, and the record of plaintiff's last entry having been introduced in evidence as Government's Exhibit A(1), and the matter having been argued orally and upon written memoranda, and having been submitted to the Court for decision, and the Court being fully advised makes the following Findings of Fact, Conclusions of Law, and Judgment:

Findings of Fact

I.

Jurisdiction is invoked for declaratory judgment under the Declaratory Judgment Act for injunctive relief and for judicial review of a final order of deportation under 28 U.S.C.A., § 2201 and Title 5, U.S.C., § 1009, et seq., the Administrative Procedures Act.

II.

The plaintiff is a resident of the County of Los Angeles, California.

III.

The defendant is the District Director of the Immigration and Naturalization Service, Department of Justice, at Los Angeles, California.

IV.

Plaintiff was born in the Philippine Islands in 1903. He first entered the United States in 1924, and was deported to the Philippine Islands on April 18, 1936, on the ground that he had been managing a house of prostitution and had been found to have received and derived benefits from the earnings of a prostitute.

On December 31, 1956, plaintiff entered the United States at Baltimore, Maryland, as a crewman, receiving a Crewman's Landing Permit (State Department Symbol D-2), and was required to depart from the United States before the expiration of 29 days, pursuant to Title 8, U. S. Code, § 1282 (a)(2). At that time plaintiff entered as a non-

immigrant alien under Section 8, U. S. Code, § 1101(a)(15)(D), and said permit was extended to February 27, 1957.

Plaintiff did not depart at or prior to the date indicated on his Crewman's Landing Permit and proceedings were commenced by the Immigration and Naturalization Service which resulted in an order as follows:

"Order

"It is ordered that the respondent be granted voluntary departure at his own expense in lieu of deportation within such period of time and under such conditions as the District Director shall direct.

"It Is Further Ordered that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause."

An appeal was taken from said order and the Board of Immigration Appeals confirmed said order on August 7, 1958, and plaintiff was ordered deported on the grounds that as a non-immigrant he had remained in the United States longer than permitted, in violation of Section 241(a)(2) of the Act of 1952 [8 U.S.C., 1251(a)(2)].

On or about the 13th day of October, 1958, the defendant granted plaintiff nine days to effect his departure from the United States at his own ex-

pense and informed plaintiff that failure to depart on or before October 22, 1958, would result in withdrawal of the privilege of voluntary departure and steps would be taken to effectuate deportation.

V.

All administrative remedies available to the plaintiff have been exhausted

VI.

evidence in the Administrative Record, which was There is reasonable, substantial and probative reviewed herein, to sustain the findings of the Immigration and Naturalization Service and the order of deportation.

Conclusions of Law

I.

Plaintiff was accorded due process in all the proceedings by the Immigration and Naturalization Service and its findings and order of deportation are supported by reasonable, sustantial and probative evidence, and were according to law and are affirmed.

II.

There was no error of law in the institution of the proceedings by the Immigration and Naturalization Service to deport plaintiff under Section 241(a)(2) of the Immigration and Nationality Act of 1952 [8 U.S.C., 1251(a)(2)] rather than Section 242(f) of the Immigration and Nationality Act of 1952 [8 U.S.C., 1251(f)], as the Attorney General,

in the exercise of his discretion, may choose which grounds, if any there are, upon which to base deportation, and it is not mandatory that the proceedings as to this plaintiff be commenced under Title 8 U.S.C., 1252(f) for the reason that Title 8 U.S.C., 1252(f) is a procedural section only. Blankenstein v. Shaughnessy, (D.C., S.C., N.Y., 1953), 112 F. Supp. 607, and Souza v. Barber, No. 15913, C.A. 9, January 30, 1959, ... F. 2d .....

III.

The final order of deportation as to the plaintiff should be affirmed, the injunctive relief denied, and judgment entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the final order of deportation of the plaintiff herein by the Immigration and Naturalization Service is a valid order and the injunction and other relief prayed for by the plaintiff is hereby denied, with costs to the defendant in the sum of $20.00 as and for a docket fee, pursuant to 28 U.S.C., 1923.

Dated: March 3, 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged February 26, 1959.

[Endorsed]: Filed and entered March 4, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court, and to Richard C. Hoy, District Director of Immigration and Naturalization Service, Department of Justice, and to Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney, and Arlene Martin, Assistant U. S. Attorney:

You and Each of You will please take notice, and notice is hereby given that Gregorio Arciaga Mesina, the plaintiff in the above-entitled matter, hereby appeals to the Honorable United States Court of Appeals, in and for the Ninth Judicial Circuit, from the Findings of Fact, Conclusions of Law and Judgment therein rendered on the 26th day of February, 1959, by the Honorable United States District Court for the Southern District of California, Central Division, said Findings of Fact, Conclusions of Law and Judgment having been entered on the 4th day of March, 1959, denying plaintiff's complaint for declaratory judgment and injunction enjoining defendant from deporting plaintiff.

/s/ NORMAN STILLER.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the exhibits in evidence, i.e., the certified copy of the immigration file of appellant, are to be transmitted to and considered by the Court of Appeals in its original form.

Dated: March 31, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

/s/ ARLINE MARTIN,
Assistant U. S. Attorney.

/s/ NORMAN STILLER,
Attorney for Appellant.

[Endorsed]: Filed April 1, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A.

Complaint, filed 10/16/58.

Summons, issued 10/16/58.

Answer, filed 11/18/58.

Defendant's Memorandum, filed 11/28/58.

Plaintiff's Memorandum (Statement of Facts), filed 12/31/58.

Memorandum of the Court, filed 2/19/59.

Minute Order of 1/6/59, re trial.

(Copy) Clerk's notice of entry of judgment, entered 3/4/59.

Findings of Fact, Conclusions of Law and Judgment, filed and entered 3/4/59.

Notice of Appeal, filed 3/4/59.

Designation of Record on appeal, filed 4/1/59.

Stipulation re transmittal original exhibits to Court of Appeals, filed 4/1/59.

B.

Plaintiff's Exhibits 1 and "A."

Dated: April 17, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16448. United States Court of Appeals for the Ninth Circuit. Gregorio Arciaga Mesina, Appellant, vs. Richard C. Hoy, District Director of Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 20, 1959.

Docketed: April 28, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16448

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

RICHARD C. HOY, Etc.,
Appellee.

STATEMENT OF POINTS AND DESIGNATION OF THE RECORD

The appellant makes the following statement of points on appeal:

1. That the District Court erred in finding that appellant entered as a non-immigrant alien under Section 8, U.S. Code 1101(a)(15)D, when in fact appellant could not have been legally authorized to enter the United States under Section 8, U.S. Code 1101(a)(15)D, without prior permission of the Attorney General under Section 1182A(17), 8 U.S. Code.

2. That the District Court erred in finding that appellant was accorded due process in all the proceedings by the Immigration and Naturalization Service in that the deportation order of 1936 was a serious deprivation of due process in the following respects:

a) Appellant, being born in the Philippine Islands in 1903, was a national of the United States and not an alien when deported in 1936; and as a national of the United States he could not be deportable for acts which furnished the basis for his deportation in 1936;

b) The warrant of arrest was unlawfully issued in that there was no substantial supporting evidence on which it could be based;

c) The conduct of the hearing officer as detective, policeman, prosecutor, note-taker, interpreter, and judge resulted in a hearing inconsistent with fairness and impartiality required by the concept of due process of law;

d) Appellant was not allowed to cross-examine the declarants of unsigned ex parte statements introduced by the hearing officer as exhibits;

e) Months after the hearing the said hearing officer made secret representations to the Board of Review unknown to the appellant or his attorney.

f) Such conduct by the hearing officer and the Board of Review in accepting the hearsay statements of the hearing officer was grossly unfair and unjust; that an indispensable condition of a fair hearing of a litigated issue was and is that the decision be governed by and be based upon the evidence at the hearing, that any ex parte consideration of vital evidence without allowing plain-

tiff a chance to rebut them did constitute and does constitute a denial of due process of law.

3. That the District Court erred in ruling that it is not mandatory that proceedings as to this plaintiff be commenced under Title 8, U.S.C., 1252(f).

The entire record with the exception of Defendant's Memorandum, filed 11/28/58, and Plaintiff's Memorandum (Statement of Facts), filed 12/31/58, is designated to be printed.

Dated: May 19, 1959.

/s/ NORMAN STILLER,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1959.